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(3)

No. 09-277

In the Supreme Court of the United States

CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission had authority under the Federal Power Act, 16 U.S.C. 824, 824d-824e, to review the annual calculation by ISO New England, Inc., of the minimum amount of wholesale electric capacity that must be available to assure reliable service in the New England region.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 569 F.3d 477. The orders of the Federal Energy Regulatory Commission (Pet. App. 22-83, 84-136, 137-157, 158-196, 197-210, 211-216) are reported at 118 F.E.R.C. ¶ 61,157, 120 F.E.R.C. ¶ 61,234, 119 F.E.R.C. ¶ 61,161, 121 F.E.R.C. ¶ 61,125, 122 F.E.R.C. ¶ 61,144, and 123 F.E.R.C. ¶ 61,036.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20-21) was entered on June 23, 2009. Petitions for rehearing were denied on July 28, 2009 (Pet. App. 217-218, 219-

220). The petition for a writ of certiorari was filed on September 3, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA or Act), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (FERC or Commission) exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce" by public utilities. 16 U.S.C. 824(b)(1). Under the FPA, proposed rates for the sale or transmission of power within FERC's jurisdiction must be "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). The Act also provides for the Commission to review rates after they have been accepted for filing and gone into effect. If, after a hearing—either on its own motion or based on a complaint—the Commission determines that any existing rate or charge is "unjust, unreasonable, unduly discriminatory or preferential," it must determine and fix by order "the just and reasonable rate * * * to be thereafter observed and in force." 16 U.S.C. 824e(a).

2. a. Utilities in New England have a long history of coordinated interstate operation. In 1971, the New England Power Pool—a voluntary association of public utilities—began operating the bulk electric power system for the entire six-state region, centrally dispatching generating units and transmission facilities to serve the load of the various utilities in the New England States. See, *e.g.*, *New England Power Pool*, 79 F.E.R.C. ¶ 61,374, at 62,576 (1997), reh'g denied, 85 F.E.R.C. ¶ 61,242 (1998).

In the late 1990s, the New England Power Pool proposed to restructure the New England electricity markets, unbundling wholesale generation from transmission services and establishing an Independent System Operator (ISO) that would take operational control of the New England bulk electric power system. The New England Power Pool proposed that the new ISO would administer a non-discriminatory, open-access transmission tariff and would develop and administer competitive wholesale electricity markets in New England. In a series of orders issued between 1997 and 2001, the Commission accepted those proposals. See *New England Power Pool*, 79 F.E.R.C. ¶ 61,374, reh'g denied, 85 F.E.R.C. ¶ 61,242 (1998) (conditionally authorizing establishment of ISO New England); *New England Power Pool*, 83 F.E.R.C. ¶ 61,045 (1998), reh'g denied, 95 F.E.R.C. ¶ 61,074 (2001) (conditionally accepting open-access transmission tariff); *New England Power Pool*, 85 F.E.R.C. ¶ 61,379 (1998) (conditionally accepting market rules and conditionally approving market-based rates); *New England Power Pool*, 87 F.E.R.C. ¶ 61,045 (1999) (conditionally accepting new and revised market rules). FERC later approved a comprehensive redesign of the New England wholesale electricity markets. See *New England Power Pool & ISO New England, Inc.*, 100 F.E.R.C. ¶ 61,287 (2002).

b. This case involves the electric capacity market in New England. Capacity is the ability to produce energy when needed; in a capacity market, unlike a traditional wholesale energy market, an electricity provider purchases from a generator or other supplier the option to buy a specific quantity of energy, regardless of whether the energy itself is ultimately purchased. Pet. App. 3-4. Providers make such purchases in order to maintain the

reliability of the electric grid by ensuring that they are able to respond adequately to fluctuations in demand. *Id.* at 4.

For many years before the establishment of ISO New England, the New England Power Pool had established an Installed Capacity Requirement (ICR), obligating load-serving utilities in the power pool to acquire an amount of electric capacity equal to their peak load plus a reserve margin, or else make a required payment. See *ISO New England, Inc.*, 91 F.E.R.C. ¶ 61,311, at 62,080 (2000). As the Commission explained, "if a utility had an [installed capacity] deficiency, it could either obtain its requirements from an entity having a surplus or be subject to a deficiency charge from the pool," with the pool charge for deficiencies "generally determined on the basis of the regulated cost of the electric facilities." *Ibid.* In *Municipalities of Groton* v. *FERC*, 587 F.2d 1296 (D.C. Cir. 1978), the court of appeals rejected a challenge to FERC's jurisdiction over the deficiency charge assessed by the New England Power Pool. *Id.* at 1301-1302. Later, authority to set the ICR was transferred from the New England Power Pool to ISO New England. See *ISO New England Inc.*, 106 F.E.R.C. ¶ 61,280, order on reh'g, 109 F.E.R.C. ¶ 61,147 (2004), petition for review denied, *Maine Pub. Utils. Comm'n* v. *FERC*, 454 F.3d 278 (D.C. Cir. 2006).

In 2006, the Commission approved a comprehensive settlement that restructured the New England capacity market. See *Devon Power LLC*, 115 F.E.R.C. ¶ 61,340, order on reh'g, 117 F.E.R.C. ¶ 61,133. The Commission's orders were affirmed in relevant respect in *Maine Public Utilities Commission* v. *FERC*, 520 F.3d 464 (D.C. Cir. 2008), cert. granted *sub nom. NRG Power Marketing, LLC* v. *Maine Public Utilities Commission*,

No. 08-674 (argued Nov. 3, 2009). As the court of appeals explained, the settlement creates a forward capacity market that "establishes a market design for determining capacity charges," but it does not set the ICR "or in any way determine the appropriate amount of capacity that must be available." *Id.* at 480 (citation omitted). Thus, while the court in *Maine Public Utilities Commission* affirmed the Commission's statutory jurisdiction over the forward capacity market, it reserved the question whether that jurisdiction encompasses FERC's review of the ICR itself. *Ibid.*

3. In the orders at issue here, the Commission concluded that it had statutory authority to review ISO New England's ICR. Pet. App. 22-216. As the Commission explained, the ICR "is expressed as the total number of [megawatts] that New England's Load Serving Entities," that is, the public utilities that deliver electricity to end users, "will be required to purchase" by auction in the wholesale forward capacity market in New England. *Id.* at 85. That number is then "subdivided to arrive at the amount of [megawatts] of capacity that each [utility] must purchase for that year." *Ibid.* The Commission concluded that the ICR "directly affects the determination of the clearing price in the capacity market and so directly affects charges to customers" in that wholesale market. *Ibid.* Accordingly, in the Commission's view, the calculation of the ICR fell within the agency's jurisdiction under Sections 824(b)(1), 824d(a), and 824e(a). *Id.* at 98. The Commission noted that the Act confers on it the responsibility for ensuring that wholesale rates and charges, including any practices affecting them, are just and reasonable. *Ibid.* "[G]iven that the ICR is one of the principal determinants of the price of capacity and thus of charges to customers, re-

view of the determination of the ICR rests with the Commission." *Id.* at 98-99.

The Commission distinguished between the "'capacity' requirement" at issue in its orders and "electrical generating capacity," the former being "the ability to produce electric energy to serve load" when called on to do so by ISO New England, and the latter being "one means, but not the only means, of producing that product." Pet. App. 100. The agency emphasized that, by reviewing the ICR, it was exercising authority solely over the capacity requirement, and not over electrical "generating capacity that states must build (or require to be built)." *Id.* at 99.

4. The court of appeals denied petitions for review. Pet. App. 1-19.

The court of appeals began by noting that petitioners had conceded "that the Commission may determine just and reasonable capacity charges" in the wholesale capacity market and may also "set those charges so as to incentivize the procurement or creation of additional capacity to ensure system reliability." Pet. App. 9 (internal quotation marks and brackets omitted). In the court's view, that concession "radically simplifie[d] the legal question" in this case. *Ibid.* The court explained that, despite its name, the ICR "doesn't actually 'require' anyone to 'install' any new 'capacity' at all." *Id.* at 10. Instead, it "is better understood not as a capacity *requirement* but as something more like a peak demand estimate," employed in ISO New England's forward capacity market "to locate the price at which market incentives will be sufficient to meet that expected demand." *Id.* at 10-11. Because there was no question that the Commission "could directly set the price of capacity at this lev[el] precisely to incentivize procurement

of resources adequate to meet" the estimate of peak demand, "and because this estimate necessarily affects prices but not necessarily new capacity construction," the court concluded that there was no "direct regulation of generation facilities." *Id.* at 11; see 16 U.S.C. 824(b)(1) (providing that the Commission generally "shall not have jurisdiction * * * over facilities used for the generation of electric energy").

The court of appeals also rejected the argument that the Commission had "exceeded its jurisdiction * * * by compelling [utilities] to acquire a particular amount of capacity" in the wholesale market. Pet. App. 13. First, the court explained, "nothing in the Federal Power Act expressly proscribes requiring [utilities] to pay for a certain amount of capacity." *Ibid.* Second, even if the Act did contain such a prohibition, the Commission had not claimed authority to require the purchase of a particular amount of capacity; rather, it had "claim[ed] authority to review the capacity charges that [ISO New England] imposes on member utilities to ensure they are just and reasonable." *Id.* at 15. Third, the court noted, the Commission's authority to require utilities to make adequate capacity purchases had already been established in *Municipalities of Groton* and in *Mississippi Industries* v. *FERC*, 808 F.2d 1425 (D.C. Cir.), vacated in part on other grounds, 822 F.2d 1103 (D.C. Cir.), cert. denied, 484 U.S. 985 (1987). Pet. App. 15-17.

ARGUMENT

Petitioners renew their contention (Pet. 17-40) that the Commission exceeded its statutory jurisdiction in its review of ISO New England's installed capacity requirement (ICR). The court of appeals correctly rejected that argument, and its decision does not conflict with

any decision of this Court or any other court of appeals. Further review is not warranted.

1. In the orders at issue here, the Commission reviewed a calculation by ISO New England of the level of wholesale capacity that New England utilities must maintain to ensure the reliability of electric services. As the orders describe in detail, that calculation directly affects the price of wholesale electric capacity in two respects. First, it affects wholesale electric rates in that the higher the level of the ICR (*i.e.*, the greater the demand for capacity), the higher the eventual wholesale charges to customers. See, *e.g.*, Pet. App. 98-99. Second, the ICR is the quantity component of a wholesale electricity rate formula because it determines utilities' costs. *Id.* at 102-103. In making those findings, the Commission considered and rejected petitioners' contention that it was violating 16 U.S.C. 824(b)(1) by directly regulating facilities used for generation of electric energy. Pet. App. 99. As the Commission explained, it was neither "exercising authority over electrical generating capacity or setting the amount of generating capacity that states must build (or require to be built)." *Ibid.*

Likewise, the court of appeals recognized that the ICR "doesn't actually 'require' anyone to 'install' any new 'capacity' at all," but is instead "something more like a peak demand estimate" that ISO New England's forward capacity market uses "to locate the price at which market incentives will be sufficient to meet that expected demand." Pet. App. 10-11. As such, it is part of a mechanism for setting rates for the wholesale interstate sale of electricity, and therefore falls within FERC's jurisdiction under 16 U.S.C. 824(b)(1) and 824d(a). See *New York* v. *FERC*, 535 U.S. 1 (2002).

2. Petitioners assert (Pet. 22) that the decision below "conflicts with this Court's guidance and the rule in other circuits for deference to an agency's interpretation of its statutory jurisdiction," because the court of appeals erroneously deferred to the Commission's assertion of jurisdiction over ISO New England's ICR calculation. *Ibid.* (capitalization and emphasis omitted). That is incorrect. While the court of appeals correctly stated that deference generally is appropriate when a court reviews an agency's interpretation of a statute defining its jurisdiction, Pet. App. 9, that proposition was not in any way outcome determinative. Instead the court framed the ultimate legal question in the case as whether "setting the ICR represent[s] the kind of direct regulation of generation facilities plainly forbidden by" Section 824(b)(1). *Id.* at 9-10. Based on undisputed facts established by the record before it, and without any resort to principles of deference, the court answered that question in the negative. *Id.* at 10.

As the court of appeals accurately observed, ISO New England's ICR, despite its name, neither requires the installation of capacity nor interferes with state regulation of generating facilities: "State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission." Pet. App. 10. Those factors, which petitioners do not dispute, were dispositive here. Thus, even assuming that the "lower courts require further guidance" on the application of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), to questions of agency jurisdiction (Pet. 25), this

case would be a poor vehicle for providing such guidance, because *Chevron* was irrelevant to the court of appeals' decision.

3. Petitioners further argue (Pet. 26-29) that the court of appeals disregarded the statutory limits on FERC's jurisdiction under the FPA. Petitioners maintain that the ICR effectively requires the installation of generating facilities and that FERC review of the ICR is therefore contrary to Section 824(b)(1)'s prohibition of federal regulation of such facilities. That argument rests on the incorrect premise that the Commission's orders somehow require the construction of generating facilities. In fact, the orders determine electric capacity *prices* in order to provide an incentive for sufficient capacity to be available in the wholesale market for reliable electric operation; that capacity might be provided by construction of generation, but it could also be provided by contracts to import power or by demand response (*i.e.*, lowering electric demand at times when supply is limited). Pet. App. 10. Because petitioners conceded that "the Commission could directly set the price of capacity at this level precisely to incentivize procurement of resources adequate to meet their estimates of peak demand, * * * and because this estimate necessarily affects prices but not necessarily new capacity construction," the court logically concluded that the agency's orders did not effect a "direct regulation of generation facilities" that would violate Section 824. *Id.* at 11 (citation omitted).

Contrary to petitioners' suggestion (Pet. 23), the decision below is fully consistent with this Court's decision in *New York* v. *FERC*, *supra*. In that case, the Court considered FERC's assertion of jurisdiction under 16 U.S.C. 824d and 824e to regulate unbundled transmis-

sion of electricity, even to retail customers otherwise subject to state regulation. *New York*, 535 U.S. at 10-14. The Court distinguished between the Commission's direct regulation of unbundled transmission, which is within its FPA jurisdiction, and the indirect effects of that regulation on retail transactions, which are subject to state authority. *Id.* at 23. "Because federal authority has been asserted only over unbundled *transmissions*," the Court explained, "New York retains jurisdiction of the ultimate sale of the *energy*." *Ibid.* In this case, the purchase of capacity under the ISO New England arrangement is in effect an option purchase by load-serving utilities to enable them to purchase power when needed in order to satisfy peak demand. Like the distinction this Court drew in *New York* v. *FERC*, the court of appeals in this case distinguished between the Commission's clear authority to regulate the wholesale price of electric capacity—which might indirectly affect conduct within state authority by encouraging the building of generating facilities—and the jurisdiction retained by the States to regulate such facilities. Pet. App. 14.

Nor are petitioners correct when they assert (Pet. 26) that the court failed to take into account various provisions of the FPA in which, they say, "Congress reiterated its proscription on FERC's authority to order additional generation facilities in order to assure adequate, sufficient, or reliable electric service." Petitioners rely on 16 U.S.C. 824f, which allows the Commission, upon complaint of a state commission, to "determine the proper, adequate, or sufficient service" required from an interstate utility and to "fix the same by its order." But that provision, the court of appeals explained, "actually grants authority to the Commission, and even if the clause 'upon complaint of a State commission' is read as

'only upon complaint of a state commission,' this section seems to be about energy itself rather than capacity.'" Pet. App. 14 (quoting 16 U.S.C. 824f). Petitioners also rely on 16 U.S.C. 824*o*, which grants FERC jurisdiction over the reliability of electric power but contains a savings clause, Section 824*o*(i)(2), stating that it "does not authorize [FERC] * * * to set and enforce compliance with standards for adequacy or safety of electric facilities or services." Nothing in that clause, the court observed, "prohibit[s] the Commission from requiring capacity purchases—as a savings clause, it deals only with the authority that section provides rather than what the Act as a whole forbids." Pet. App. 14. The court therefore correctly concluded that neither Section 824f nor Section 824*o* "prohibits the Commission from requiring [load-serving entities] to obtain adequate capacity." *Ibid.*

In any event, as the court of appeals accurately observed, the Commission here "claims authority to review the capacity charges that ISO [New England] imposes on member utilities to ensure that they are just and reasonable," not to require an entity to acquire a particular amount of capacity. Pet. App. 15. "That reasonable concerns about system adequacy might factor into the fairness of those charges," the court concluded, "is precisely what brings them within the heartland of the Commission's [Section 824e] jurisdiction." *Ibid.*

4. Finally, petitioners contend (Pet. 32-35) that the court of appeals' holding that the ICR is a "practice affecting * * * rates" under Sections 824d and 824e is contrary to *Northwest Central Pipeline Corp.* v. *State Corporation Commission*, 489 U.S. 493 (1989), in which this Court held that a state regulation governing the timing of production of natural gas was not preempted

by the Natural Gas Act, 15 U.S.C. 717 *et seq.* *Northwest Central Pipeline*, 489 U.S. at 496. In that case, the Court determined that the regulation of gas production was "a field that Congress expressly left to the States"; because the regulation at issue did "not conflict with the federal regulatory scheme," it was not preempted. *Id.* at 509. As the Commission explained, however, *Northwest Central Pipeline* is not relevant here, as it "speaks to the question of whether a federal agency's regulation of a particular area pre-empts state regulation in that area." Pet. App. 110. In this case, by contrast, FERC did not preempt state regulation "as to when or where or how many new generating facilities should be built in that state." *Ibid.*

FERC's analysis is consistent with *New York*, which confirmed the Commission's authority to draw reasonable lines to define the extent of its own jurisdiction over wholesale sales and interstate transmission. See 535 U.S. at 16-17. As the court of appeals noted here, the Commission's review of the calculation of ISO New England's capacity requirements involved similarly reasonable line-drawing. Pet. App. 15; see *Niagara Mohawk Power Corp.* v. *FERC*, 452 F.3d 822, 828 (D.C. Cir. 2006), cert. denied, 550 U.S. 918 (2007). That the statute's direct grant of jurisdiction to the Commission may incidentally affect state matters does not diminish the agency's authority. See *e.g.*, *National Ass'n of Regulatory Util. Comm'rs* v. *FERC*, 475 F.3d 1277, 1280-1284 (D.C. Cir. 2007), cert. denied, 128 S. Ct. 1468 (2008).

Finally, petitioners err in suggesting (Pet. 36-38) that the decision below opens the door to FERC regulation over any number of traditional state areas, such as state zoning ordinances. The individual New England States have never regulated the electric capacity needs

of the long-integrated New England electrical transmission system. Instead, since the 1970s, such planning has been done on a system-wide basis by the New England Power Pool, and more recently by ISO New England. Pet. App. 17. That interstate planning and associated rates and terms fall squarely within the Commission's jurisdiction over the interstate transmission of electric power and the sale of electric power at wholesale in interstate commerce. And the court of appeals has approved FERC orders regulating such arrangements since 1978. See *Municipalities of Groton* v. *FERC*, 587 F.2d 1296 (D.C. Cir. 1978). Thus, even if the Commission's action in this case could be characterized as requiring capacity purchases by utilities, the court of appeals aptly observed that "this particular camel has long since entered—ndeed, ransacked—the tent." Pet. App. 15.*

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* Petitioners do not suggest that the Court should hold the petition pending the disposition of *NRG Power Marketing, LLC* v. *Maine Public Utilities Commission*, No. 08-674 (argued Nov. 3, 2009), and there is no reason for doing so. Although both cases involve electric capacity in New England, they present entirely independent legal issues. *NRG Power Marketing* involves the applicability of the "public interest" standard prescribed in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), to challenges to certain rates established under the comprehensive settlement of disputes involving the New England capacity market. It does not present any question of the scope of the Commission's jurisdiction under the FPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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